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Supreme Court of the United States

October Term, 1959

No. 496

COLUMBIA CASUALTY COMPANY,
Petitioner,

versus

ANTHONY LOCICERO, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No.

COLUMBIA CASUALTY COMPANY,
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versus

ANTHONY LoCICERO, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Judge and the Associate Justices of the United States:

COLUMBIA CASUALTY COMPANY prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, dated June 30, 1959, wherein a rehearing was denied on July 31, 1959.

I.

CITATION TO OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 268 F.2d 440, and is printed in Appendix A hereto, *infra* page 15.

II.

JURISDICTION.

The jurisdiction of this Court to review this case on certiorari is invoked under 28 U.S. Code, Section 1254(1).

III.

THE QUESTION PRESENTED FOR REVIEW.

Reversing the judgment of the United States District Court for the Eastern District of Louisiana, entered pursuant to a jury verdict for the defendant, the Court of Appeals held that the defendant's insured's driver was guilty of negligence as a matter of law. The alleged negligence of the defendant's insured's driver was based on an ordinance requiring that the driver of an emergency vehicle sound a siren "to the extent reasonably necessary". Contrary to the jury verdict, the Court of Appeals held that the question of when and to the extent it was reasonably necessary to sound a siren was a matter of law rather than a question of fact.

This decision in effect deprives the defendant of the right to a jury determination of the question of negligence guaranteed by the Seventh Amendment to the United States Constitution, and ignores the repeated holdings of this Court to the effect that where fair-minded men may draw different conclusions, even from undisputed facts, a question of fact for the jury is presented.

IV.

STATUTE INVOLVED.

The only statute involved is the Traffic Ordinance of the City of New Orleans printed in Appendix B *infra* page 25: Chapter 38 of the Code of the City of New Orleans, 1956, Section 38-37.

V.

STATEMENT OF THE CASE.

Anthony LoCicero, a pedestrian, was struck by a police squad car which was on an emergency mission in the City of New Orleans, and died some months later. The respondents (plaintiffs below) are the surviving major children of the deceased. The petitioner (defendant below) is the automobile liability insurer of the City of New Orleans. The facts are simple and for the most part uncontroverted:

On October 11, 1956 at approximately 5:00 P.M., the Police Department was notified that there was a holdup in progress at the French Market on Decatur Street in the City of New Orleans. A police squad car was dispatched

to the scene of the reported holdup. The police car proceeded without incident from the Station House to Decatur Street and turned north on that street a number of blocks south of its ultimate destination. Decatur Street was a wide two-way street running approximately north and south. After turning on to Decatur Street, the police car encountered a long time of traffic headed in the same direction, stopped at a red signal light at the intersection of Wilkinson Street with Decatur Street. The squad car drove to the left of this line of stopped traffic and upon arriving at the red signal light at Wilkinson Street, momentarily stopped or slowed almost to a stop. Since no traffic was approaching on the intersecting street, the police car proceeded past the red light and after successfully negotiating the intersection, returned to its proper lane of traffic. From this intersection to the French Market, a number of blocks to the north, Decatur Street was straight and completely clear of either pedestrian or vehicular traffic and the car rapidly accelerated to a maximum speed of between thirty and thirty-five miles per hour. There was a long line of traffic on Decatur Street heading in a southerly direction, opposite to the direction of the squad car, which was stopped for the red signal light at the intersection. As the police car passed the next intersection, a short City block to the north of the Wilkinson Street signal light, the deceased suddenly emerged from between two cars directly into the path of the squad car. The point at which the deceased was attempting to cross the street was north of the intersection and was not an authorized pedestrian crossing. At the instant that the deceased

emerged from between the parked cars into the view of the driver of the police car, the driver made an emergency application of the brakes but was unable to stop before striking the deceased.

The Traffic Ordinance of the City of New Orleans (Appendix, B) provides that the driver of an emergency vehicle may exceed the speed limit and proceed past a red stop light after slowing down to the extent necessary for safe operation, provided that the driver "sounds a siren, bell or exhaust whistle to the extent reasonably necessary" and displays a lighted red lamp visible from the front. The speed limit on Decatur Street was twenty miles per hour. The police car admittedly displayed a flashing red dome light visible from the front but did not sound its siren.

The Trial Judge included in his instructions to the jury on the law of negligence the applicable provisions of the New Orleans City Traffic Ordinance, and advised the jury that a violation of this ordinance by the driver of the police vehicle constituted negligence. The jury rendered a verdict in favor of petitioner (defendant below) and respondents perfected an appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals held that the District Judge erred in not instructing the jury that the defendant was guilty of negligence as a matter of law for not sounding a siren, remanding the case for a new trial.

VI.

REASONS FOR GRANTING WRIT.

The Court of Appeal Erred in Reversing the Judgment Based on a Jury Verdict and Departed from Repeated Decisions of this Honorable Court when it Held that the Question of Negligence was a Matter of Law for the Court to Decide Rather than a Question of Fact for the Jury where the Applicable Standard of Care Required Reasonable Conduct.

The standard of care imposed on the defendant's insured's driver in this case by the applicable statutory provision required that he sound a siren "to the extent reasonably necessary". It seems axiomatic that under such a statutory provision the question of when and to the extent it is reasonably necessary to sound a siren depends upon the factual circumstances presented by each case, and is a question of fact which must be decided by the trier of the facts. In this case the fact was established without contradiction that the police car had a clear, unobstructed roadway in front of it, and although under these circumstances some might believe that it was negligence to fail to sound a siren, others might as readily believe that it was not reasonably necessary to do so. The holding of the Court of Appeals that under the circumstances of this case the failure to sound a siren constituted negligence, has deprived petitioner of its constitutional right to have the issue tried by a jury and is in direct conflict with this Honorable Court's interpretation of the tests to be applied to determine which issues are jury questions. *Richmond & Danville RR. Co. v.*

Powers, et al., 149 US 43, 13 S.Ct. 748, 37 L.Ed. 642 (1893); *Best v. District of Columbia*, 291 US 411, 54 S.Ct. 487, 78 L.Ed. 882 (1934); *Texas & Pacific RR Co. vs. Harvey*, 228 US 319, 33 S.Ct. 518, 57 L.Ed. 852 (1912); *Lavender v. Kurn*, 327 US 645, 66 S.Ct 740, 90 L.Ed. 916 (1946); *Webb v. Illinois Central Railroad Co.*, 352 US 512, 77 S.Ct. 451, 1 L.Ed. 2d 503 (1957). For instance in the *Richmond v. Powers* case, *supra*, the sole question presented was whether the lower court erred in refusing to instruct the jury that the decedent was guilty of contributory negligence as a matter of law where the undisputed facts showed that he was killed when he stepped onto the tracks in front of a moving railroad train at night. In holding that the question of contributory negligence was a matter of fact, this Honorable Court stated:

> ". . . It is well settled that, where there is uncertainty as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair minded men will honestly draw different conclusions from them."

Similarly, in *Best vs. District of Columbia*, *supra*, in reversing the trial court's action in directing a verdict, this honorable Court said:

> "*Where uncertainty arises either from a conflict of testimony or because facts being undisputed, fair minded men may honestly draw different conclusions from them, the question is not one of law, but of fact to be settled by the jury.*" (Italics supplied.)

Again in the case of *Lavender vs. Kurn, supra,* in overruling the Missouri Supreme Court, which had held that the evidence of negligence was not sufficiently substantial to warrant submission of the question to the jury, stated:

> "It is no answer to say that the jury's verdict involved speculation or conjecture. Whenever facts are in dispute or the evidence is such that fair minded men might draw different inferences, a measure of speculation or conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. . . . it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The Court of Appeals in the instant case took it upon itself to decide that it was reasonably necessary to sound a siren, thereby depriving the jury of the right to determine what was reasonably necessary under the circumstances. Such a holding is completely contrary to decisions of other Courts of Appeal. For instance, in the case of *Burchan vs. J. P. Stevens & Company,* 209 F.2d 35 (CCA 4th, 1954), the plaintiff's truck made a left turn into a roadside restaurant and was struck by the defendant's on-coming truck. A Virginia statute prohibited the crossing of a double line painted on the highway. The defendant argued that the plaintiff was negligent as a matter of law in driving across the double line in the center of the highway, and the trial court granted the defendant's motion for a judgment notwithstanding the verdict. On appeal the Court of Ap-

peals reversed the lower court and quoted with approval from *Waid v. Chesapeake & O. R. Co.*, 14 F. 2d 90, 93:

> "There is no fixed standard in the law by which a Court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care', 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. *What may be deemed ordinary care in one case, may under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the Court.* It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. *When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.* . . ."

> "Whether a question is one for the decision of the court or of the jury is a question of federal practice as to which we are governed by federal and not by state decisions. We are bound by state decisions as to the substantive law applicable in a case of

> this sort, but by federal law, not state law, as to whether a question is for the decision of the judge or the jury under the Seventh Amendment.'" (Italics Supplied.)

Because under the Constitution of Louisiana appellate state courts are permitted to review the facts, whether found by jury or judge, there are no Louisiana cases involving a determination of what matters constitute questions of fact for determination by the trier of the facts, and what matters are questions of law for the Court. However, there are several decisions from other jurisdictions almost directly on point, holding that when an ordinance or statute requires that a vehicle sound a siren, slow down or stop, as may be reasonably necessary for safety, the determination of the question of whether the driver of the vehicle has complied with the ordinance is one to be determined by the trier of the facts and not by the court. The case of *Travis v. Collett*, 218 Minn. 592, 17 NW 2d 68 (1944), involved the interpretation of a traffic statute reading as follows:

> "The driver of any authorized emergency vehicle, when responding to an emergency call, *upon approaching a red or stop signal or any stop sign, shall slow down as necessary for safety*, but may proceed cautiously past such red or stop signs or signal after sounding siren and displaying red lights." (Italics supplied.)

In this case the emergency vehicle ran a stop sign at 35 miles per hour without slowing down. The Trial Court instructed the jury that this action in the light of the statute was negligence as a matter of law, and

submitted the case to the jury only on the issues of proximate cause and contributory negligence. The Appellate Court reversed and said:

> "Whether the *slowing down is necessary, the extent of slowing down that is required*, and whether the driver proceeded with caution or due care depend upon all the facts and circumstances of each case and *are questions the determination of which rests peculiarly with the trier of fact*: Rogers v. Minneapolis St. Ry. Co., Minn. '6 N.W. 2d 758, filed December 8, 1944. If reasonable minds may differ as to how the questions should be answered, the court should not decide them as a matter of law." (Italics supplied.)

In the case of *Isaacs v. City and County of San Francisco*, 73 CA2d 621, 167 P.2d 221, the occupants of an automobile sued for injuries sustained when the car in which they were riding was struck at an intersection by a fire apparatus owned by the defendant City. The material parts of the applicable statute provided that negligence on the part of emergency vehicles could not be predicated on breaches of the traffic laws when the "vehicle is . . . responding to but not upon returning from the fire alarm" and "when the driver of said vehicle sounds the siren as may be reasonably necessary", but this exemption "shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway nor shall the provisions of this section *protect* any such driver from the consequences *of an arbitrary exercise* of the provisions declared in this section" (Italics sup-

plied). One of the material questions for determination was whether a siren was sounded and *the necessity of giving a siren signal*. The appellate court reversed a non-suit against plaintiff and stated:

> "In the present case whether a siren signal was given, and the necessity of giving a signal are questions of fact which on motion for non-suit must be determined in plaintiff's favor."

Counsel readily admits that undisputed evidence of the violation of a traffic statute is negligence as a matter of law when the language of the statute conclusively determines a standard of care applicable. However, when the standard of care required by the statute is couched in the terms of reasonableness or reasonable necessity, then the question of whether the standard created has been met is a question of fact for the jury. In the case of *Thomas v. Roland*, 162 F.Supp. 622 (U.S.D.C. E.D. Pa. 1958) the plaintiff sued for damages sustained in an intersectional collision on a highway in the State of Pennsylvania. The Pennsylvania Vehicle Code provided that the right of way granted by the statute did not relieve the driver of a vehicle on a through highway from the duty to drive with due regard to the safety of vehicles entering the highway, nor the arbitrary exercise of the right of way. The Trial Court charged the jury that if it found that the driver on the right of way street did not look for approaching traffic, he was "guilty of negligence as a matter of law". In granting the defense's motion for a new trial from an adverse jury verdict, the Court said:

> "It has been decided in Pennsylvania that the violation of a statute regulating highway traffic is

negligence as a matter of law when the statute is final and conclusive in determining the standard of care to be applied to motorists: Jinks v. Currie, 1936, 324 Pa. 532, 188 A. 356 (failing to give a left turn signal); d'Ambrosio v. Philadelphia, 1946, 354 Pa. 403, 47 A. 2d 256, 174 A.L.R. 1166 (riding on a tailgate of a truck); Landis v. Conestoga Transportation Co., 1944, 349 Pa. 97, 100, 36 A. 2d 465 (exceeding statutory speed limit). However, when a statute creates a standard so vague as to require definition by a court or jury (Restatement, Torts, Sec. 285, Comment b) then it is for a jury to determine whether or not a defendant under the facts was guilty of negligence, and where such a statute is under consideration, a court can declare all acts of violation of the statute to be negligence as a matter of law where the question before it is whether or not a defendant is guilty of negligence.

The Traffic Ordinance of the City of New Orleans in the instant case requiring an emergency vehicle to sound a siren "to the extent reasonably necessary" certainly sets up a definite standard about which the minds of fair men might differ in determining whether the standard has been met. The Trial Court clearly instructed the jury on the standard of care imposed upon an emergency vehicle on an emergency mission under the Traffic Ordinances of the City of New Orleans, advising them that a violation of this Ordinance constituted negligence. The jury returned a verdict for the defendant. By reversing the judgment based on this verdict, the Court of Appeals has usurped the function of a Federal jury.

VII.

CONCLUSION.

For the foregoing reasons it is respectfully suggested that a writ of certiorari should be granted and that the decision of the Court of Appeals should be reversed and the judgment of the trial court reinstated.

Respectfully submitted.

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CERTIFICATE

This certifies that copy of this Petition has been served on Counsel for ANTHONY LoCICERO, ET AL., Respondents, by delivery in person on the ____ day of OCTOBER, 1959.

ERNEST A. CARRERE, JR.

APPENDIX A.

Decision of the United States Court of Appeals.
(June 30, 1959.)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: Anthony Lo Cicero, an elderly gentleman, was struck and fatally injured by a police car answering an emergency call about five o'clock P.M. on Decatur Street in New Orleans, Louisiana. Appellants (plaintiffs below), his children and sole survivors, sued appellee (defendant below), Columbia Casualty Company, the insurance carrier of the City of New Orleans, alleging that their father was negligently killed. The case was submitted to a jury, which returned a verdict against appellants and in favor of the insurance company.

Appellants seek a reversal on the ground that the verdict was contrary to the law and the evidence; that the court committed specified errors in refusing instructions requested by them, and in charging the jury too favorably to appellee; and on other grounds which it is not necessary to discuss in this opinion. Our decision will be based upon the error of the court in submitting to the jury the question of defendant's negligence vel non instead of, as it should have done, instructing the jury that, under the city ordinance, conditionally exempting emergency vehicles from normal safety observance, and the undisputed evidence of the driver of the police car

that he was deliberately and intentionally operating the car without sounding the required siren signal, defendant was, as matter of law, guilty of negligence, and the only issues for the jury's consideration were proximate cause, contributory negligence, and last clear chance.

The facts set forth by appellee as constituting those which it contends the jury was warranted in accepting, are these: "On October 11, 1956, at approximately 5:00 P.M. the police department was notified that there was a holdup in progress at the French Market on Decatur Street. A City of New Orleans police car, driven by Patrolman Conrad, accompanied by Patrolman Cassaro, was immediately dispatched to the scene from the First District police station on Basin Street. With its red flashing dome light turned on, [but because of the hold-up alarm siren not sounding] the car proceeded from Basin Street onto Toulouse Street and turned left onto Decatur Street in the direction of the French Market. When the driver of the squad car reached Decatur Street, he noticed that there was a long line of traffic stopped on Decatur Street for a red signal light at the intersection of Decatur Street with Wilkinson Street. The police car drove to the left of the line of traffic, proceeded to the red traffic light at the intersection of Wilkinson Street and stopped momentarily (or almost stopped), proceeded across the red light, turning back into its right lane of traffic, and then proceeded down Decatur Street toward the French Market on its emergency mission. After having passed the line of stopped traffic and the red signal light at Wilkinson

Street, the police vehicle had a clear roadway on Decatur Street to the French Market several blocks away. There was a long line of traffic to the left of the police car on Decatur Street heading in the opposite direction which was stopped for the Wilkinson Street red light. This stopped line of traffic extended past the intersection of Decatur Street and St. Peter Street or a distance of about a block and a half. As the police car entered the intersection of St. Peter Street, the driver saw the plaintiffs' deceased father Mr. Lo Cicero, suddenly emerge from behind the stopped automobiles without looking for approaching traffic, apparently attempting to cross Decatur Street from Jackson Square to the river or from the driver's left to right. Patrolman Conrad slammed on his brakes as soon as Mr. Lo Cicero appeared from behind the parked cars and attempted to avoid striking him. Unfortunately, however, just before the police car came to a stop, it hit Mr. Lo Cicero with its right front headlight. Although the police car was being driven at a speed of between 30 to 35 miles per hour at the time that Mr. Lo Cicero appeared from behind the stopped vehicles, it did not move more than a . . . [few feet after] striking him. The witnesses closest to the scene of the accident placed the location of the accident at about 40 to 50 feet beyond the intersection of Decatur and St. Peter Streets."

Appellants' evidence developed quite a different case. According to their proof, Decatur Street, 51.5 feet wide, ran substantially north and south and was used by traffic as a two-way street. It was intersected at right angles by St. Peter Street and by Wilkinson Street 165.3

feet to the south. The decedent approached Decatur walking east along St. Peter and found a line of vehicular traffic on the west side of the street, all vehicles being stationary in obedience to the red traffic light at Wilkinson Street. He passed between two of these vehicles and looked in both directions observing no traffic in movement and, without the benefit of siren signal, which was deliberately not being sounded, he began at a normal pace to cross Decatur angling somewhat north of the east and west course of St. Peter. The red traffic light at Wilkinson was in clear view and its protective assurance extended to decedent on St. Peter. After crossing approximately 43 feet of the intersection, he had reached a point substantially 8.5 feet from the east curb of Decatur when he was struck by a New Orleans police car, which had skidded 58 feet before striking him.

The police car had proceeded in the west or left lane of Decatur until it reached Wilkinson and was obscured from decedent's view by the unbroken line of immobilized motor vehicles extending from Wilkinson to and beyond where decedent entered it at St. Peter. The automobile made an "S" turn as it crossed Wilkinson in order to pass from the left to the right side of the street and take advantage of the unoccupied traffic lanes resulting from the red light. The point where he was struck was about 17 feet east of the center line of Decatur. Assuming that the automobile was being driven at a speed of 30 miles per hour, it was traveling 44 feet per second; and assuming that decedent was walking 4 miles per hour, he would have moved 5.03 feet per

second. In other words, the police car was traveling approximately eight times as fast as decedent.

Both parties in effect concede that in view of the refusal of the driver to sound the siren, the crucial point in the case is the application and effect of the City Code Section of New Orleans regulating emergency vehicles,[1] the pertinent portion reading:

> "The provisions of this chapter regulating the operation, parking and standing of vehicles shall apply to authorized emergency vehicles, as defined in this article, except as follows:
>
> A driver when operating any such vehicle in an emergency . . . may . . . (2) proceed past a red or stop signal or stop sign, but only after slowing down to the extent necessary for safe operation; and
>
> (3) Exceed the prima facie speed limit so long as he does not endanger life or property.
>
> The foregoing exemption granted in reference to the movement of an authorized emergency vehicle shall *apply only when the driver of such vehicle sounds a siren, bell or exhaust whistle to the extent reasonably necessary* and the vehicle displays a lighted red lamp visible from the front as a warning to others. This shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others." [Emphasis added.]

The italicized words apply to the driver of the vehicle involved and permit him to exceed the speed limit, run

[1] Motor Vehicle and Traffic Ordinances of the City of New Orleans, Chapter 38 of the Code of 1956, §38-37.

on the left side of the street, violate red lights, etc., only when he sounds a siren to the extent reasonably necessary. That means that the duty varies from second to second dependent upon the conditions with which the driver is faced. This police car was being operated at substantially the time when the "five o'clock traffic" was cluttering almost all streets and in addition when employees of a nearby manufacturing plant were leaving in the haste which generally attends those eager to get home or to a refreshing drink following a day's work.

The duties laid upon the driver of an emergency vehicle by this ordinance are exacting and require fast thinking, close and constant attention, speedy reactions and calm, quick judgment, uninfluenced by any factor except consideration of the public safety. Under its explicit terms, the right to ignore the safeguards which pedestrians habitually and instinctively rely upon in making their hazardous way through the mazes of motor vehicles which confront them at every hand, is a conditional privilege, hedged in by such phrases as "to the extent necessary for safe operation" and "so long as he does not endanger life or property." A reasonable construction of the ordinance would not permit these safeguards so clearly imposed upon the driver to be dispensed with by him either of his own motion or on orders from his superiors.

In the court below appellee, realizing the strong impact as a matter of law of the testimony of the driver, that, because of the nature of the police call then being answered, he had deliberately done away with the safeguards which alone justified emergency driving and as a

result had illegally subjected all persons and traffic on the street to great peril, sought to introduce evidence tending to show that these safeguards placed upon the driver had, because of the nature of the call, been abrogated by orders from his superiors and the driver was not therefore at fault. The proffer was made while Officer Cassaro, one of the occupants of the police car, was being questioned by appellee's attorney. After testifying positively that the siren was not being operated, he explained its deliberate non-operation in this way, that he was answering a holdup call, which is a rare call, and if they had used the siren, "it can be heard all over the French Market area, because it is a small area, and whoever was committing the holdup would hear it and normally would naturally leave right away." This statement demonstrating that the officer was giving primary consideration, not to the safety of the public on the streets but the desirability of catching those who were committing the crime, appellee's counsel endeavored to exculpate him from his admitted fault by showing that the portion of the ordinance requiring the driver to drive so as not to endanger life or property had in effect been nullified so that the driver was excused by the action of his superiors in instructing drivers to omit using the siren when answering holdup calls.[2]

---

[2] "Q. Did you have instructions from your superiors — rather, please state whether or not you had instructions from your superiors when going to a holdup in progress that you should not use the siren?"

Mr. Reinold: "I object to any instructions from his superiors because that cannot contradict the Code of New Orleans relative to emergency operation. . . . that cannot contravene the Code of the City of New Orleans relative to the operation of motor vehicle of emergency vehicles."

The Court: "I'll sustain the objection. The point is this, Mr. Waechter, that if the instructions are negligent, then the liability is the same. . . ."

Appellants objected to his proffer on the ground that the drivers' superiors cannot contravene the Code of New Orleans relative to the emergency operation of motor vehicles, and the court, stating in effect that neither the driver nor his superiors had authority to suspend or vary the ordinance correctly sustained the objection.

This, we think, was a manifestly correct ruling, and the court's attention having been directly called to the admitted fault of the driver in willfully violating the ordinance, it was plain error not to charge the jury directly that the driver was negligent. As stated, the ordinance laid the duty upon the driver to do what was reasonably required in the interest of safety at every moment and under all conditions. The ordinance made no exception in the case of holdups. If, as counsel was seeking to prove the driver's superiors had taken away from him the right and duty to use judgment fitting the particular emergency and to act for the protection of human life by the use of the siren, they had in effect repealed the ordinance, or at least, in effect, rendered it sterile. The genius of the ordinance was to place human life above such activities as intercepting those who had forcibly set upon others to take their money or property. The proof tendered in attempted justification of the admittedly open violation of the ordinance would if it had been accepted as an excuse, operate to shut off the use of all sirens when cars were engaged in such a mission. This would be in contravention of the ordinance and would in fact amount to a defiance of its terms. It would be difficult to overestimate the impor-

tance of such proof. Anyone who has grown accustomed to the repeated and persistent wail of sirens of emergency vehicles going through the streets of New Orleans and other cities would know instinctively that the average pedestrian relies upon being warned of approaching danger by a siren—a much more challenging and efficacious means of warning than flashing lights.

It is true that the plaintiff did not except to the charge for failure to instruct that the defendant was guilty of negligence as matter of law in failing to sound the siren or give other audible signal; nor request a charge of his own to that effect. Under the circumstances, however, revealed by the evidence in this case, including the undisputed proof of the driver that he was violating the ordinance, it was plain error not so to instruct the jury. Appellants in their brief make this quite clear. Arguing that failure of the police car to sound a siren, horn or other audible signal was a major cause of the accident, the appellants point out that the mere sounding of the siren or blowing of the horn could have easily been heard 315 feet away at the intersection of St. Peter Street and certainly, if the horn had been sounded or the siren blown, as the police vehicle reached Wilkinson Street, some 165 feet from St. Peter Street, the pedestrian could undoubtedly have heard the horn and taken measures to protect himself.

For the failure of the district court to instruct the jury that defendant was guilty of negligence as matter of law and to submit to it, therefore, only the issues of

proximate cause, contributory negligence, and last clear chance the judgment is REVERSED and the cause is REMANDED for a new trial consistent with the views above expressed.

REVERSED and REMANDED.

APPENDIX B.

The Code of the City of New Orleans 1956.
Section 38-37—Exemptions to authorized emergency vehicles.

"The provisions of this chapter regulating the operation, parking and standing of vehicles shall apply to authorized emergency vehicles, as defined in this article, except as follows:

A driver when operating any such vehicle in an emergency, except when otherwise directed by a Police Officer, may:

(1) Park or stand notwithstanding the provisions of this article;

(2) Proceed past a red or stop signal or stop sign, but only after slowing down to the extent necessary for safe operation; and

(3) Exceed the prima facie speed limit so long as he does not endanger life or property.

The foregoing exemptions granted in reference to the movement of an authorized emergency vehicle shall apply only when the driver of such vehicle sounds a siren, bell or exhaust whistle to the extent reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to others. They shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others. . . ."

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 496

COLUMBIA CASUALTY COMPANY,
Petitioner,

versus

ANTHONY LoCICERO, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable, the Chief Judge and the Associate Justices of the United States:

Respondents, Anthony LoCicero, et al, the surviving sons and daughters of Joseph LoCicero, deceased, pray for a denial of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, dated June 30, 1959, wherein a rehearing was denied on July 31, 1959.

I

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 268 F. 2d 440, and is printed in Appendix A hereto, *infra* page 15.

II.

THE QUESTION PRESENTED FOR REVIEW

The United States Court of Appeals for the Fifth Circuit held that since the undisputed evidence clearly showed a breach of a legal duty, the defendant's insured's driver was guilty of negligence as a matter of law, and reversed the judgment of the United States District Court for the Eastern District of Louisiana, entered pursuant to a jury verdict for the defendant. The question presented for review is whether, the facts being undisputed, it is the duty of the Court to instruct the jury that in view of a statutory duty those facts constitute negligence.

III.

STATUTE INVOLVED

The only statute involved is the Traffic Ordinance of the City of New Orleans printed in Appendix B *infra* page 24; Chapter 38 of the Code of the City of New Orleans; 1956, Section 38-37.

IV.

STATEMENT OF THE CASE

This is a suit for damages arising out of the injury and resulting death to a pedestrian by a police squad car owned and operated by the New Orleans Police Department on October 11, 1956 at 4:50 P.M. on Decatur St. at or near the intersection of St. Peter Street in the City of New Orleans.

The respondents are the surviving sons and daughters of the pedestrian involved.

This accident occurred at 4:50 P.M. on October 11, 1956 during the daylight hours on Decatur Street at or near the intersection of St. Peter Street, in New Orleans.

There is a traffic light at the intersection of Decatur and Wilkinson Streets, aproximately one-half block from Canal Street toward the aforementioned intersection of Decatur and St. Peter Streets; Decatur Street is a two-way street for vehicular traffic and runs north and south in the City of New Orleans.

The respondents' father, Joseph LoCicero, was walking across Decatur Street in the direction of the Mississippi River at or near the intersection of St. Peter Street; that during the period of time in which the pedestrian, Joseph LoCicero, was crossing Decatur Street, the aforementioned traffic light at Decatur and Wilkinson Streets was red to traffic proceeding on Decatur Street and, as a result thereof, a number of vehicles were lined up on Decatur Street waiting at a standstill.

A vehicle, sometimes known as a police squad car, owned by the Police Department of the City of New Orleans and operated by an employee, a police officer, Joseph P. Conrad, was proceeding on Decatur Street in the direction of Esplanade Ave.; that, as aforementioned, a number of vehicles were lined up on Decatur Street in both directions waiting at a standstill due to the said red traffic light; the police squad car passed the entire line of vehicles which was waiting to proceed toward Esplanade Ave. on Decatur Street, on the left or wrong side of Decatur Street, at a very high rate of speed, and arrived at the corner of Decatur and Wilkinson Streets while the traffic light was still red to Decatur Street traffic; there were also a number of vehicles lined up on Decatur Street waiting to proceed to Canal Street. The police squad car crossed the said intersection on a red traffic light, contrary to the traffic ordinance of the City of New Orleans, swerved abruptly at the corner of Wilkinson and Decatur Streets from the lake side to the

river side of Decatur Street (making an "S" turn in the words of the driver, Joseph Conrad) and continued on the river side of Decatur Street in the direction of St. Peter, passing all of the vehicles awaiting the traffic light. The police squad car was accelerated so abruptly and rapidly that the tires made a loud squealing noise and attracted the attention of other motorists and pedestrians in the area. The police squad car attained a high rate of speed in excess of the normal limit provided in the City of New Orleans Traffic Ordinance.

When the police car arrived at the intersection of St. Peter and Decatur Streets, the pedestrian, Joseph LoCicero, had almost completed crossing Decatur Street and had arrived at a point exactly 8½ feet from the river side curb of Decatur Street. Decatur Street is, according to the survey produced by respondents at the trial, 51 feet and some inches wide from curb to curb. The police squad car skidded 58 feet and then struck Joseph LoCicero, knocking him to the pavement of the street causing painful, serious and fatal injuries, referred to hereinafter.

The police car was being operated by a Police Officer, Joseph Conrad, an employee of the Police Department of the City of New Orleans, and it is uncontradicted that the accident occurred during the course of and arose within the scope of his employment. Respondents allege and we submit, has proved, that the accident was caused solely and entirely by the negligence and carelessness of Joseph Conrad, the Police Officer, in the operation of the car.

Joseph LoCicero was taken to Charity Hospital immediately after the accident and remained hospitalized at that Institution until he succumbed on or about Janu-

ary 20, 1957. His injuries were painful, serious and fatal. Respondents and petitioner entered into a stipulation to the effect that the respondents' father, Joseph LoCicero, died as a result of the injuries which he received in the accident and the complications resulting therefrom.

Trial was held in the United States District Court at New Orleans before Judge J. Kelly Wright, on May, 1958 before a jury. The jury returned a verdict in favor of the Columbia Casualty Company. Judgment was entered in favor of Columbia Casualty Company. A motion for a new trial was filed by respondents and denied by the Judge of the District Court. Respondents appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The judgment of the Circuit Court was reversed and the case remanded.

All of the witnesses, including the driver of the police squad car and his passenger, another policeman, were unanimously in agreement in their testimony that the following violations were committed by the driver of the police squad car:

1. That he ran through a red traffic signal light.
2. That the speed of the police squad vehicle was in excess of the limit permitted by the City Ordinance.
3. That he failed to sound a siren, horn or other warning device prior to the accident.

V.

REASONS FOR DENYING WRIT.

The Court Of Appeals Was Not In Error In Reversing The Judgment Based On A Jury Verdict, When It Held That The Question Of Negligence Was A Matter Of Law For The Court To Decide Rather Than A Question Of Fact For The Jury, Where The Negligence Flowed From A Breach Of A Legal Duty Imposed By Statute And Where The Facts Of Performance Or Omission Were Uncontroverted. Therefore, It Does Not Fall Within The Considerations Governing Review On Writ Of Certiorari.

Matters of negligence sometimes present mixed questions of law and fact. *The Sioux City & Pacific Railroad Co. v. Harry G. Stout*, 17 Wall. 657, 21 L. Ed. 745 (1874). But the construction of a public statute or treaty is exclusively a matter of law which cannot be changed by calling legal conclusions findings of fact. Conceding then that the performance or omission of an act is a question of fact, yet once said performance or omission is established, whether or not it was a breach of a legal duty is a question of law.

Generally, the determination of whether there has been any negligence involves two injuiries. First, what would have been ordinary care under the circumstances; and second, whether the conduct of the person charged with negligence came up to that standard. However, where a legal duty is imposed by public statute, the jury have but one inquiry to make. They have only to find whether he upon whom the duty rests, has performed it. If he has not, the law fixes the character of his failure and pronounces it negligence. *Detroit & Milwaukee R.R. Co. v. Steinberg*, 17 Mich. 99 (1868).

The pertinent portion of the Traffic Ordinance of the City of New Orleans regulating emergency vehicles is as follows:

> "'The provisions of this chapter regulating the operation, parking and standing of vehicles shall apply to authorized emergency vehicles, as defined in this article, except as follows:
>
> "'A driver when operating any such vehicle in an emergency * * * may * * * (2) proceed past a red or stop signal or stop sign, but only after slowing down to the extent necessary for safe operation; and
>
> "'(3) Exceed the *prima facie* speed limit so long as he does not endanger life or property.
>
> "'The foregoing exemption granted in reference to the movement of an authorized emergency vehicle shall **apply only when the driver of such vehicle sounds a siren, bell or exhaust whistle to the extent reasonably necessary** and the vehicle displays a lighted red lamp visible from the front as a warning to others. This shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others.' (Emphasis added)"

The Court of Appeals correctly interpreted the applicable statute as placing the legal duty "upon the driver to do what was reasonably required in the interest of safety at every moment and under all conditions. The Ordinance made no exception in the case of holdups". *LoCicero v. Columbia Casualty Co.*, 268 F. 2d 440, 444. Therefore the only question which might have been decided by the jury was the performance or omission of an act in relation to the legal duty imposed, viz., to sound a siren to the extent reasonably necessary in the interest of public safety. This determination was not

needed, however, since the undisputed evidence presented by the testimony of the driver showed that he failed to sound the siren because, "It can be heard all over the French Market area, because it is a small area, and whoever was committing the holdup would hear it and normally would naturally leave right away." *LoCicero v. Columbia Casualty Co., supra*, page 443. The primary consideration of public safety was admittedly subordinated to the desirability of catching a thief, and the Court clearly held this to be a breach of his legal duty and, hence, he was negligent as a matter of law.

Had the above facts been disputed or even though undisputed where an inference might have been drawn as to the driver's primary consideration in failing to sound a siren, it might then be argued that it was a jury function to weigh the evidence and arrive at a verdict. But surely in the light of the undisputed testimony of the driver, fair-minded men could not honestly draw different conclusions regarding his reason for not sounding the siren.

Support for fixing the legal duty imposed by the statute involved as being one of public safety can be found, not only in the State statute of similar nature, but also in the Louisiana judicial interpretations of the duty imposed by such legislation. In the case of *Calvert Fire Insurance Co. v. Hall Funeral Home*, 68 S. 2d 626 (2d Circuit—1953), a similar emergency vehicle exempt statute was in issue. In a general discussion of such legislation, the Louisiana Court of Appeals interpreted the duty imposed on the driver of an emergency vehicle as being to refrain from a reckless disregard of the safety of other motorists and pedestrians.

The particular ordinance involved in that case required the warning device, siren, bell, whistle or horn of

such an emergency vehicle to be constantly sounded. In determining the responsibility of the driver of the emergency vehicle in view of the exemption granted, the Louisiana Court of Appeals stated:

> "The burden of care imposed upon the operator of an emergency vehicle requires something more than the mere sounding of a siren or the blinking of a red light. These warnings are ordinarily sufficient to give notice of the approach of an emergency vehicle toward a point of danger, but there are other considerations. When approaching an intersection against a traffic signal light giving crosswise traffic a 'green' or 'go' sign, and where traffic approaching from either his left or right is obscured, the driver of the emergency vehicle should diminish his speed and bring under control his vehicle until he can be reasonably certain he may pass without unduly subjecting other motorists or pedestrians to danger. He should be aware that notwithstanding the warning from the siren other motorists or pedestrians may still be proceeding through the intersection on the invitation of a green light. Instances may well be imagined where noise or interference of some nature would prevent the hearing of the signal. This, it seems to us, is a factor that should be anticipated by the driver of the emergency vehicle and appropriate control exercised, and where by his failure to so act other motorists or pedestrians are endangered the exemption granted under the ordinance must be considered forfeited." *Calvert Fire Insurance Co. v. Hall Funeral Home*, *supra*, page 629.

It seems, therefore, that the Louisiana Court of Appeals properly measures the primary consideration of the driver of an emergency vehicle in terms of public safety.

Thus, as United States Court of Appeals in the instant case pointed out, the driver cannot substitute his

individual considerations in derogation of the law. The Court wisely held in effect that to permit subjective determinations as to what considerations were reasonable would be to nullify the purpose of the law, for if a policeman could give primary consideration to catching a thief, then an ambulance driver would be equally justified in giving primary consideration to the comfort of his patient-occupant. In this respect this Honorable Court in *Edward L. Baker v. Sterling Gee*, 1 Wall. 333, 17 L. Ed. 563, refused to adopt a construction of a statute which would render valueless a wise provision thereof, and to allow subjective considerations in this instance would certainly render the provision for public safety valueless.

With regard to the cases presented in our worthy opponent's petition for writ of certiorari we cannot quarrel with the law as stated therein. However, a close reading of the authorities presented disclose a feature common to all which enables one to distinguish them from the case before this Court.

In every case cited therein there was involved either a conflict of testimony, or the facts being established permitted inferences to be drawn therefrom.

One of the more notable examples of this can be found in the California case of *Isaacs v. The City and County of San Francisco*, 73 C.A. 2d 621, 167 P. 2d 221, cited on page 11 of the petition for the writ of certiorari. On page 12 of petitioner's brief the following quote is taken from the *Isaacs* case:

> "In the present case whether a siren signal was given, and the necessity of giving a signal are questions of fact which on motion for non-suit must be determined in plaintiff's favor."

On reading the case it can be seen that the plaintiff's petition had denied that a siren had been sounded, and he so testified that he heard no siren. Although the evidence, through testimony of the driver of the emergency vehicle and other witnesses, showed that the siren was sounded, the Court was bound to deny a motion for nonsuit and submit the conflict to the jury; in the matter here presented for review there was no dispute as to whether or not the siren was sounded, but a dispute as to whether the failure to sound a siren without considering the immediate circumstances of such omission was a breach of the statutory duty.

The authorities of this Honorable Court cited throughout opponent's brief invariably involve an assessment of the evidence to determine whether submission to the jury was warranted and just as invariably you have held that where uncertainty of negligence arises from a conflict in testimony or consideration of facts being undisputed, fairminded men will honestly draw different conclusions from them, the question is one for a jury. Such a proposition is so well settled that it would be folly to dispute it. Therefore, while agreeing with the proposition for what it represents, we dispute its application to the present case, because no inference is permissible from the evidence presented.

On page 12 of the petitioner's brief he states, "Counsel readily admits that the undisputed evidence of the violation of a traffic statute is negligence as a matter of law when the language of the statute conclusively determines a standard of care applicable. However, when the standard of care required by the statute is couched in the terms of reasonableness or reasonable necessity, then the question of whether the standard created has been met is a question of fact for the jury." It is respect-

fully submitted to this Court that the Traffic Ordinance of the City of New Orleans requiring an emergency vehicle to sound a siren to the extent reasonably necessary followed by a provision regarding the public safety, cannot be stated as setting such an indefinite standard as would require its interpretation by a jury. The interpretation and construction of statutes has historically been the function of the Court, and the instant case presents no different conclusion. Therefore, the United States Court of Appeals was entirely correct in its holding that the test of reasonable necessity was the public safety. "If there is no dispute as to the facts and the circumstances surrounding the facts, then the Court cannot escape the duty of passing upon the question and instructing the jury one or the other as to whether those facts constitute negligence or do not constitute negligence". *Riggs v. Standard Oil Co.*, 130 F. 199, (C.C., D. Minn.—1904). Respondents submit that the only issues to be decided by the jury were issues of proximate cause, contributory negligence, and last clear chance as decided by the Court of Appeals in the instant case.

VI.

CONCLUSION

For the foregoing reasons it is respectfully suggested that a writ of certiorari should be denied, in that no special and important reason is presented for review.

Respectfully submitted,

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CERTIFICATE

This certifies that copy of this brief has been served on counsel for Columbia Casualty Company, petitioner, by delivery in person on the _____ day of November, 1959.

Robert R. Rainold

APPENDIX A

Decision of the United States Court of Appeals.

(June 30, 1959.)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: Anthony LoCicero, an elderly gentleman, was struck and fatally injured by a police car answering an emergency call about five o'clock P.M. on Decatur Street in New Orleans, Louisiana. Appellants (plaintiffs below), his children and sole survivors, sued appellee (defendant below), Columbia Casualty Company, the insurance carrier of the City of New Orleans, alleging that their father was negligently killed. The case was submitted to a jury, which returned a verdict against appellants and in favor of the insurance company.

Appellant seek a reversal on the ground that the verdict was contrary to the law and the evidence; that the court committed specified errors in refusing instructions requested by them, and in charging the jury too favorably to appellee; and on other grounds which it is not necessary to discuss in this opinion. Our decision will be based upon the error of the court in submitting to the jury the quest of defendant's negligence vel non instead of, as it should have done, instructing the jury that, under the city ordinance, conditionally exempting emergency vehicles from normal safety observance, and the undisputed evidence of the driver of the police car that he was deliberately and intentionally operating the car without sounding the required siren signal, defendant was, as matter of law, guilty of negligence, and the only

issues for the jury's consideration were proximate cause, contributory negligence, and last clear chance.

The facts set forth by appellee as constituting those which it contends the jury was warranted in accepting, are these: "On October 11, 1956, at approximately 5:00 P.M. the police department was notified that there was a holdup in progress at the French Market on Decatur Street. A City of New Orleans police car, driven by Patrolman Conrad, accompanied by Patrolman Cassaro, was immediately dispatched to the scene from the First District police station on Basin Street. With its red flashing dome light turned on, [but because of the hold-up alarm siren not sounding] the car proceeded from Basin Street onto Toulouse Street and turned left onto Decatur Street in the direction of the French Market. When the driver of the squad car reached Decatur Street, he noticed that there was a long line of traffic stopped on Decatur Street for a red signal light at the intersection of Decatur Street with Wilkinson Street. The police car drove to the left of the line of traffic, proceeded to the red traffic light at the intersection of Wilkinson Street and stopped momentarily (or almost stopped), proceeded across the red light, turning back into its right lane of traffic, and then proceeded down Decatur Street toward the French Market on its emergency mission. After having passed the line of stopped traffic and the red signal light at Wilkinson Street, the police vehicle had a clear roadway on Decatur Street to the French Market several blocks away. There was a long line of traffic to the left of the police car on Decatur Street heading in the opposite direction which was stopped for the Wilkinson Street red light. This stopped line of traffic extended past the intersection of Decatur Street and St. Peter Street or a distance of about a block and a half. As the police car entered the inter-

section of St. Peter Street, the driver saw the plaintiffs' deceased father Mr. LoCicero, suddenly emerge from behind the stopped automobiles without looking for approaching traffic, apparently attempting to cross Decatur Street from Jackson Square to the river or from the driver's left to right. Patrolman Conrad slammed on his brakes as soon as Mr. LoCicero appeared from behind the parked cars and attempted to avoid striking him. Unfortunately, however, just before the police car came to a stop, it hit Mr. LoCicero with its right front headlight. Although the police car was being driven at a speed of between 30 to 35 miles per hour at the time that Mr. LoCicero appeared from behind the stopped vehicles, it did not move more than a . . . [few feet after] striking him. The witnesses closest to the scene of the accident placed the location of the accident at about 40 to 50 feet beyond the intersection of Decatur and St. Peter Streets."

Appellants' evidence developed quite a different case. According to their proof, Decatur Street, 51.5 feet wide, ran substantially north and south and was used by traffic as a two-way street. It was intersected at right angles by St. Peter Street and by Wilkinson Street 165.33 feet to the south. The decedent approached Decatur walking east along St. Peter and found a line of vehicular traffic on the west side of the street, all vehicles being stationary in obedience to the red traffic light at Wilkinson Street. He passed between two of these vehicles and looked in both directions observing no traffic in movement and, without the benefit of siren signal, which was deliberately not being sounded, he began at a normal pace to cross Decatur angling somewhat north of the east and west course of St. Peter. The red traffic light at Wilkinson was in clear view and its protective assurance extended to decedent on St. Peter. After crossing approxi-

mately 43 feet of the intersection, he had reached a point substantially 8.5 feet from the east curb of Decatur when he was struck by a New Orleans police car, which had skidded 58 feet before striking him.

The police car had proceeded in the west or left lane of Decatur until it reached Wilkinson and was obscured from decedent's view by the unbroken line of immobilized motor vehicles extending from Wilkinson to and beyond where decedent entered it at St. Peter. The automobile made an "S" turn as it crossed Wilkinson in order to pass from the left to the right side of the street and take advantage of the unoccupied traffic lanes resulting from the red light. The point where he was struck was about 17 feet east of the center line of Decatur. Assuming that the automobile was being driven at a speed of 30 miles per hour, it was traveling 44 feet per second; and assuming that decedent was walking 4 miles per hour, he would have moved 5.9 feet per second. In other words, the police car was traveling approximately eight times as fast as decedent.

Both parties in effect concede that in view of the refusal of the driver to sound the siren, the crucial point in the case is the application and effect of the City Code Section of New Orleans regulating emergency vehicles,[1] the pertinent portion reading:

> "The provisions of this chapter regulating the operation, parking and standing of vehicles shall apply to authorized emergency vehicles, as defined in this article, except as follows:
>
> A driver when operating any such vehicle in an emergency . . . may . . . (2) proceed past a red or stop signal or stop sign, but only after slowing

[1] Motor Vehicle and Traffic Ordinances of the City of New Orleans, Chapter 38 of the Code of 1956, §§ 38-37.

down to the extent necessary for safe operation; and

(3) Exceed the *prima facie* speed limit so long as he does not endanger life or property.

The foregoing exemption granted in reference to the movement of an authorized emergency vehicle shall *apply only when the driver of such vehicle sounds a siren, bell or exhaust whistle to the extent reasonably necessary* and the vehicle displays a lighted red lamp visible from the front as a warning to others. This shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others." [Emphasis added.]

The italicized words apply to the driver of the vehicle involved and permit him to exceed the speed limit, run on the left side of the street, violate red lights, etc., only when he sounds a siren to the extent reasonably necessary. That means that the duty varies from second to second dependent upon the conditions with which the driver is faced. This police car was being operated at substantially the time when the "five o'clock traffic" was cluttering almost all streets and in addition when employees of a nearby manufacturing plant were leaving in the haste which generally attends those eager to get home or to a refreshing drink following a day's work.

The duties laid upon the driver of an emergency vehicle by this ordinance are exacting and require fast thinking, close and constant attention, speedy reactions and calm, quick judgment, uninfluenced by any factor except consideration of the public safety. Under its explicit terms, the right to ignore the safeguards which pedestrians habitually and instinctively rely upon in making their hazardous way through the mazes of motor vehicles which confront them at every hand, is a condi-

tional privilege, hedged in by such phrases as "to the extent necessary for safe operation" and "so long as he does not endanger life or property." A reasonable construction of the ordinance would not permit these safeguards so clearly imposed upon the driver to be dispensed with by him either of his own motion or on orders from his superiors.

In the court below appellee, realizing the strong impact as a matter of law of the testimony of the driver, that, because of the nature of the police call then being answered, he had deliberately done away with the safeguards which alone justified emergency driving and as a result had illegally subjected all persons and traffic on the street to great peril, sought to introduce evidence tending to show that these safeguards placed upon the driver had, because of the nature of the call, been abrogated by orders from his superiors and the driver was not therefore at fault. The proffer was made while Officer Cassaro, one of the occupants of the police car, was being questioned by appellee's attorney. After testifying positively that the siren was not being operated, he explained its deliberate non-operation in this way, that he was answering a holdup call, which is a rare call, and if they had used the siren, "it can be heard all over the French Market area, because it is a small area, and whoever was committing the holdup would hear it and normally would naturally leave right away." This statement demonstrating that the officer was giving primary consideration, not to the safety of the public on the streets but the desirability of catching those who were committing the crime, appellee's counsel endeavored to exculpate him from his admitted fault by showing that the portion of the ordinance requiring the driver to drive so as not to endanger life or property had in effect been nullified so that the driver was excused by the action of

his superiors in instructing drivers to omit using the siren when answering holdup calls.[2]

Appellants objected to his proffer on the ground that the drivers' superiors cannot contravene the Code of New Orleans relative to the emergency operation of motor vehicles, and the court, stating in effect that neither the driver nor his superiors had authority to suspend or vary the ordinance correctly sustained the objection.

This, we think, was a manifestly correct ruling, and the court's attention having been directly called to the admitted fault of the driver in willfully violating the ordinance, it was plain error not to charge the jury directly that the driver was negligent. As stated, the ordinance laid the duty upon the driver to do what was reasonably required in the interest of safety at every moment and under all conditions. The ordinance made no exception in the case of holdups. If, as counsel was seeking to prove the driver's superiors had taken away from him the right and duty to use judgment fitting the particular emergency and to act for the protection of human life by the use of the siren, they had in effect repealed the ordinance, or at least, in effect, rendered it sterile. The genius of the ordinance was to place human life above such activities as intercepting those who had forcibly set upon others to take their money or property. The proof tendered in attempted justification of the admittedly open violation of the ordinance would

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[2] "Q. Did you have instructions from your superiors—rather, please state whether or not you had instructions from your superiors when going to a holdup in progress that you should not use the siren?"

Mr. Rainold: "I object to any instructions from his superiors because that cannot contradict the Code of New Orleans relative to emergency operation. . . . that cannot contravene the Code of the City of New Orleans relative to the operation of motor vehicle of emergency vehicles."

The Court: "I'll sustain the objection. The point is this, Mr. Waechter, that if the instructions are negligent, then the liability is the same. . . ."

if it had been accepted as an excuse, operate to shut off the use of all sirens when cars were engaged in such a mission. This would be in contravention of the ordinance and would in fact amount to a defiance of its terms. It would be difficult to overestimate the importance of such proof. Anyone who has grown accustomed to the repeated and persistent wail of sirens of emergency vehicles going through the streets of New Orleans and other cities would know instinctively that the average pedestrian relies upon being warned of approaching danger by a siren—a much more challenging and efficacious means of warning than flashing lights.

It is true that the plaintiff did not except to the charge for failure to instruct that the defendant was guilty of negligence as matter of law in failing to sound the siren or give other audible signal, nor request a charge of his own to that effect. Under the circumstances, however, revealed by the evidence in this case, including the undisputed proof of the driver that he was violating the ordinance, it was plain error not so to instruct the jury. Appellants in their brief make this quite clear. Arguing that failure of the police car to sound a siren, horn or other audible signal was a major cause of the accident, the appellants point out that the mere sounding of the siren or blowing of the horn could have easily been heard 315 feet away at the intersection of St. Peter Street and certainly, if the horn had been sounded or the siren blown, as the police vehicle reached Wilkinson Street, some 165 feet from St. Peter Street, the pedestrian could undoubtedly have heard the horn and taken measures to protect himself.

For the failure of the district court to instruct the jury that defendant was guilty of negligence as matter of law and to submit to it, therefore, only the issues of

proximate cause, contributory negligence, and last clear chance the judgment is REVERSED and the cause is REMANDED for a new trial consistent with the views above expressed.

REVERSED and REMANDED.

APPENDIX B

The Code of the City of New Orleans 1956.

Section 38-37—Exemptions to authorized emergency vehicles.

"The provisions of this chapter regulating the operation, parking and standing of vehicles shall apply to authorized emergency vehicles, as defined in this article, except as follows:

A driver when operating any such vehicle in an emergency, except when otherwise directed by a Police Officer, may:

(1) Park or stand notwithstanding the provisions of this article;

(2) Proceed past a red or stop signal or stop sign, but only after slowing down to the extent necessary for safe operation; and

(3) Exceed the *prima facie* speed limit so long as he does not endanger life or property.

The foregoing exemptions granted in reference to the movement of an authorized emergency vehicle shall apply only when the driver of such vehicle sounds a siren, bell or exhaust whistle to the extent reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to others. They shall not, however, protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others. . . ."